STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THOMAS C. HALLORAN	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1986.	:	

Petitioner, Thomas C. Halloran, 9 Coach Road, Lexington, Massachusetts 02173, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1986 (File No. 806902).

Pursuant to 20 NYCRR 3000.5(c)(1), by a motion dated November 8, 1989, petitioner moved for summary determination on the grounds that there were no material and triable issues of fact presented by the pleadings, and the undisputed facts mandated a finding in petitioner's favor. By answering papers dated November 30, 1989, the Division of Taxation requested summary determination in its favor. Papers in reply dated December 15, 1989 were submitted by petitioner. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq. and Richard Kaufman, Esq., of counsel). After due consideration of the record, Frank W. Barrie, Administrative Law Judge, hereby renders the following determination.

ISSUE

Whether compensation received by a nonresident of New York from his employment in New York State while on paid sick leave for an entire calendar year, during which he performed no work in New York, is subject to New York personal income tax.

FINDINGS OF FACT

On or about April 15, 1987, petitioner, Thomas C. Halloran, and his wife, Kathleen H. Halloran, jointly filed a New York State Nonresident Income Tax Return for 1986. During 1986, petitioner and his wife were residents of Connecticut although the specific address is not contained in the record herein. They requested a refund of $5,375.38 in the tax return. This amount had been withheld from petitioner's wages by his employer, the United States Department of Transportation, Federal Aviation Administration (hereinafter "FAA"), and paid over to New York State.

On July 2, 1987, the Division of Taxation notified petitioner and his wife that tax was due in the amount of $298.66 for 1986 under an assessment No. A07072088C. Nine months later, on April 19, 1988, the Division again notified petitioner and his wife of a deficiency of $298.66, but now identified the assessment as No. A870702088C. Finally, in the following month on May 27, 1988, the Division notified petitioner and his wife of a tax deficiency of $280.62 plus interest of $20.23 for an amount due of $300.85 for 1986, that was identified as

Assessment No. A870702088I. Neither party submitted copies of the earlier two notices, and it cannot be determined why three distinct notices of deficiency might have been issued against petitioner and his wife for 1986. Further, no explanation was provided by the Division of Taxation for the three varying assessment numbers.

On or about May 2, 1988, petitioner filed an amended New York State Nonresident Income Tax Return for 1986, in which he deleted his wife as a party to the tax return. The amended return still requested a refund of $5,375.38.

Petitioner, an attorney, was employed by the FAA in its Regional Office located at John F. Kennedy (J.F.K.) International Airport, Jamaica, New York. The record on this motion is extremely bare concerning petitioner's employment with the FAA. For example, there is no information concerning the duration of petitioner's employment nor of his duties and responsibilities. Nor is there anything in the record concerning the nature of petitioner's employment that resulted in his performing work within and without New York. Further, the record is devoid of any specific information concerning petitioner's salary and benefits other than the following few facts. First, that during 1986, he received wages of $67,775.00 from the FAA; that during 1985 petitioner allocated 82.75% of his FAA salary to New York (so that it can be inferred that petitioner worked 82.75% of his total work days in New York during 1985); and that during the period 1981-1985, petitioner worked, on a yearly average, 78% of his total work days for the FAA in New York. Further, although it is somewhat speculative, in light of the fact that petitioner received a paid leave of absence for health reasons, that has been referred to in this record as "sick leave pay", for an entire calendar year, it is reasonable to make a finding that petitioner must have been an employee of the FAA for an extended period of years to be entitled to this significant benefit.

On June 17, 1988, Charlene Donald, a Tax Technician II, replied in writing in reference to an earlier telephone conversation with petitioner of May 23, 1988 "regarding whether a nonresident taxpayer who works for a New York State based company is subject to New York State tax if he is out of work for the entire year." (Emphasis in the original.) She advised petitioner, in part, as follows:

> "Since the taxpayer did not work in New York State for any part of the year, he would not be subject to New York State tax on the salary received during that year.
>
> If the taxpayer had worked during the year, the allocation of New York wage and salary income would be based on the actual days worked in New York State over the total days worked in the year. There is no limit on the amount of sick leave and annual leave to be claimed in the allocation formula."

By a letter dated December 2, 1988, the Audit Division - Central Income Tax Section recomputed petitioner's tax and determined that petitioner had overpaid tax for 1986 in the amount of $180.02. The letter, in part, provided the following explanation:

> "Salary paid for non-working days is a form of wage continuation for work performed in prior periods. Such payments constitute regular earnings as an employee even though the taxpayer did not actually render any services for compensation. Consequently, your wage income of $67,774.66 is considered taxable in the same proportion as the immediate previous year. That percentage is 82.75%."

On April 7, 1989, the Bureau of Conciliation and Mediation Services issued a conciliation order determining that a refund of $1,687.25 was due to petitioner and his wife. Earlier, by a letter dated February 7, 1989, the conciliation conferee, in responding to

petitioner's letter and attachments setting forth his position, explained, in part, as follows:

> "Days In and Out is to be computed for work performed In and Out of New York State. If no work was performed then this method is not used, as in your case.
>
> ...[T]he income you received as a sick leave benefit is attributable to a New York source. The many years of service to your employer is the reason you are receiving sick leave pay, and that pay is received from your New York State employer.
>
> Since there was no work being performed in New York in 1986, then allocating the income based on section 131.16 through 131.18 [of the New York tax regulations] is not possible.
>
> If the normal methods of allocating are not feasible, then an alternative method needs to be devised, as some of the sick leave income is taxable to New York.
>
> Based on the information I have, Mr. Bullet's [an auditor] method using section 131.23 could be correct, but if you have another method, forward it to me and I will consider it.
>
> It seems to me that a more accurate figure could be arrived at by looking at your previous years [sic] New York returns. Therefore, please forward copies of your New York returns for the years 1985 and older, in order, as you may have."

By a letter dated February 28, 1989, the Conciliation Conferee explained the basis for his determination that a refund of $1,687.25 was due as follows:

> "Based on the figures for 1981-1985, the revised percentage should be 78%, as this is the average days worked in New York. I still feel that the sick pay should be taxed by New York State as it is attributable to your many years of employment in New York State.
>
> Mr. Bullett forwarded a recalculated figure based on 78%, amounting to a full cancellation of the deficiency and a refund of $1,687.25 plus interest."

SUMMARY OF THE PARTIES' POSITIONS

The Division of Taxation argues that when an employee, who is a nonresident of New York, is paid for days on which he performed no work because of illness, the source of the income taxable as a nonresident is the work he has already done. Further, the Division maintains that it is not counting non-working days as days worked in New York, but argues that such non-working days cannot be counted as if they were days worked elsewhere.

Petitioner contends, by contrast, that the wages he received in 1986 were not taxable to New York because he did not work in New York in 1986. He insists that a bureaucratic mindset, that a nonresident should not get a refund of taxes withheld from his salary and paid over to New York, has led to the taxation of non-working days. According to petitioner, because every day during 1986 was a non-working day, there can be no allocation of his 1986 wages to New York. Petitioner further argues that until a nonresident has working days in New York during a particular tax year, wages cannot be allocated to New York.

CONCLUSIONS OF LAW

A. 20 NYCRR 3000.5(c)(1) provides, in part, as follows:

> "After issue has been joined..., any party may move for summary determination.... The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion."

The record on this motion is bare concerning certain relevant facts, as noted in Finding of Fact "4", supra. However, there are no material and triable issues of fact that would necessitate a hearing, nor did the Division of Taxation show facts sufficient to require a hearing of any issue of fact. Rather, the Division in its response to petitioner's motion has requested summary determination in its favor. Consequently, a summary determination can be made herein as a matter of law.

B. Tax Law former § 632(a)(1), as in effect for the year at issue, provided that the New York adjusted gross income of a nonresident individual shall include the sum of the net amount of the items of income, gain, loss and deduction entering into the individual's Federal adjusted gross income which are derived from or connected with New York sources.

C. It is undeniable that petitioner's salary income from the FAA during 1986, while he was on a leave of absence for health reasons for the entire year, was an employment benefit resulting from his personal services rendered in prior years to his employer. Since in prior years, as noted in Finding of Fact "4", supra, petitioner worked the predominant share of his working days in New York, it was reasonable for the Division of Taxation to view petitioner's salary income during 1986 as derived from or connected with New York sources. It should be noted that the statutory language, "derived from or connected with New York sources", should be interpreted as the ordinary person reading it would interpret it (N.Y.S. Cable Television Assn. v. State Tax Commission, 59 AD2d 81, 397 NYS2d 205). To view wages received during a sick leave by a nonresident from his employment in New York in prior years as "derived from or connected with New York sources" is a natural and obvious interpretation of the applicable statutory language. Personal services rendered by petitioner in prior years in New York was the contractual consideration provided by petitioner for the sick leave benefit. The fact of his sickness resulted in his receiving wages during his sickness, but it was not the contractual consideration for his benefit.

D. Petitioner's argument that his salary income from the FAA in 1986 was not derived from New York sources rests on a strained reading of the tax regulations concerning the allocation of compensation for personal services rendered within and without New York (20 NYCRR 131.12 - 131.20) and confuses the purpose of these regulations.

E. 20 NYCRR 131.18(a) provides in part as follows:

> "If a nonresident employee...performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State.... In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without

pay."

Petitioner contends that his wages received during his sick leave may not be taxed because under the above regulatory language there can be no taxation of non-working days. This contention, however, must be rejected because the method of allocation based upon days in and out of New York (and the exclusion of non-working days from the relevant formula) cannot be used if no work was performed. The above regulatory language is simply inapplicable to the situation at issue. Rather, the Division of Taxation properly looked to 20 NYCRR 131.23 for guidance in resolving this matter. This regulation provides as follows:

> "Other methods of allocation. Sections 131.15 through 131.22 of this Part are designed to apportion and allocate to New York State, in a fair and equitable manner, a nonresident's items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on partly within and partly without New York State. Where the methods provided under those sections do not so allocate and apportion those items, the Tax Commission may require a taxpayer to apportion and allocate those items under such method as it prescribes, as long as the prescribed method results in a fair and equitable apportionment and allocation. A nonresident individual may submit an alternative method of apportionment and allocation with respect to items of income, gain, loss and deduction attributable to a business, trade, profession or occupation carried on partly within and partly without New York State."

The method of allocation devised by the conferee, as noted in Finding of Fact "7", supra, that resulted in a determination that a refund to petitioner of $1,687.25 was due, was eminently reasonable. It was fair, equitable and also benefited petitioner that the conferee utilized the reduced allocation percentage to New York of 78%, based on a period of five years, 1981 through 1985, instead of the allocation percentage of 82.75% based upon 1985 only.

F. The former State Tax Commission addressed a similar issue in its decision in Matter of Elsworth S. Howell and Emma R. Howell (State Tax Commission, September 28, 1979). In that case, Elsworth Howell, a New York nonresident, received compensation during a six-month period while he was on a paid leave of absence for reasons of health from his employment with Grolier, Inc., a corporation having its principal office in New York City. The Commission upheld the allocation of Mr. Howell's compensation during his sick leave based upon the allocations to New York contained in his income tax returns for the two years prior to the year at issue. Like petitioner, Mr. Howell performed no services of any kind or nature whatsoever for his employer during the period he received compensation that he claimed was not subject to New York income tax.

G. It should also be noted that it has been previously determined in a number of State Tax Commission decisions that severance or termination pay is directly connected to the performance of past services (Matter of Nathan Wagner and Roma Wagner, State Tax Commission, October 6, 1982; Matter of Thomas J. Thomas and Jean R. Thomas, State Tax Commission, October 6, 1982; Matter of Daniel D. Kinley and Margery R. Kinley, State Tax Commission, August 31, 1979). Such compensation was properly allocable to New York because it did not qualify as an annuity pursuant to 20 NYCRR 131.4(d)(2) and was considered to be related to prior services rendered partly in New York. It is reasonable to analogize to these cases in addressing the matter at hand, and to view the compensation received by petitioner while on sick leave as directly connected to his performance of past services in a similar way.

H. Finally, it should be noted that the incorrect interpretation of the Tax Law and regulations by the employee of the Division of Taxation, as described in Finding of Fact "5",

supra, does not provide grounds for estopping the Division from limiting the amount of the refund to the correct amount due to petitioner (cf. Matter of Harry's Exxon Service Station, Tax Appeals Tribunal, December 6, 1988).

I. The petition of Thomas C. Halloran is denied and his refund claim is limited to the amount determined by the Bureau of Conciliation and Mediation as noted in Finding of Fact "7", supra.

DATED: Troy, New York
February 8, 1990

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE